

STATE OF MICHIGAN
COURT OF APPEALS

JOHN ALAN NAVARRO,

Plaintiff-Appellant,

v

WHITNY MORRIS ANDREWS, as Personal
Representative of the Estate of SHIRLENE
DANETTE MORRIS, Deceased,

Defendant-Appellee.

UNPUBLISHED
September 25, 2014

No. 311612
Wayne Probate Court
LC No. 2010-758819-CZ

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right an order finding for plaintiff in the amount of \$8,400 in his claim against the estate for attendant care services. We affirm.

On appeal, plaintiff argues that: (1) the court erred in denying plaintiff's motion for summary disposition because there was no genuine issue of material fact; (2) the judge erred in his application of MCR 5.101(C)(2); (3) the court's final opinion and determination was based upon an erroneous conclusion of law; and (4) the judge's findings of fact were clearly erroneous. We disagree.

I. SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred in denying plaintiff's motion for summary disposition because there was no genuine issue of material fact that plaintiff was owed for the services he rendered on behalf of decedent, and defendant failed to set forth any specific facts in support of her response to plaintiff's motion. We disagree.

A. STANDARD OF REVIEW

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing the grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions,

and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012). This Court is “limited to considering the evidence submitted to the trial court before its decision on the motions.” *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 12; 824 NW2d 202 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

“This Court is liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). A genuine issue of material fact exists when, after viewing the evidence in the light most favorable to the nonmoving party, the record leaves open an issue upon which reasonable minds may differ. *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013). Certain circumstances might present issues of fact or credibility that preclude summary disposition even in the absence of specifically refuting documentary evidence. *White v Taylor Distrib Co*, 275 Mich App 615, 626, 628; 739 NW2d 132 (2007).

B. DISCUSSION

There was a genuine issue of material fact regarding whether plaintiff was owed money for the services rendered to decedent, therefore, the trial court properly denied plaintiff’s motion for summary disposition.

A contract may be implied in law where there is a receipt of a benefit by one person from another, and retention of the benefit is inequitable, absent reasonable compensation. *In re Estate of Lewis*, 168 Mich App 70, 74; 423 NW2d 600 (1988). This legal fiction is inapplicable when the parties have a relationship that gives rise to the presumption that services were rendered gratuitously. *Id.* A presumption of gratuity arises where the plaintiff is related by blood or marriage to the decedent, or where the parties lived together as husband and wife, despite never having married. *Id.*

The trial court erred in finding that no presumption of gratuity applied in this case. In *Featherston v Steinhoff*, 226 Mich App 584; 575 NW2d 6 (1997), this Court discussed when the presumption of gratuity applies. In *Featherston*, the plaintiff and defendant cohabited for eight years, beginning roughly six months after plaintiff gave birth to their son, but the two never married. *Id.* at 585. This Court held that “[t]hose engaged in meretricious relationships do not enjoy property rights afforded a legally married couple,” but “services rendered during a meretricious relationship are presumably gratuitous.” *Id.* at 589.

Featherston controls the case at hand. In both, the parties had a child together and cohabited for an extended period of time. These facts are sufficient to find that plaintiff and decedent were living together as husband and wife, despite never having married, and therefore, a presumption of gratuity applies. *In re Estate of Lewis*, 168 Mich App at 74. Further, in the case at hand, plaintiff testified that he and decedent were engaged to be married, and presented decedent to others as his “fiancé.” This fact, when coupled with the others, only further supports a presumption of gratuity for the services plaintiff rendered on behalf of decedent.

Even when a presumption of gratuity arises, a plaintiff may still recover for the services provided under the theory of implied-in-fact contract. *In re Estate of Morris*, 193 Mich App 579, 582; 484 NW2d 755 (1992). A contract implied in fact occurs when (1) one person performs or provides services for another, (2) with the expectation of being paid, and (3) the individual receiving the benefit expects to pay for the services. *Id.* Plaintiff's primary evidence in support of his claim that decedent expected to pay for the attendant care services was his own affidavit. Therefore, the trial judge properly denied summary disposition, in order to assess plaintiff's credibility at trial. See *Wurtz v Beecher Metro Dist*, 298 Mich App 75, 90; 825 NW2d 651 (2012), lv gtd 494 Mich 862 (2013) (holding that summary disposition is improper when the case requires a credibility determination).

Absent the presumption of gratuity, there was still a genuine issue of material fact such that summary disposition was properly denied. As the trial judge mentioned, there was an issue regarding the beneficial extent of the services rendered by plaintiff. To sufficiently prove a contract implied in law, plaintiff must show that there was a receipt of a benefit by decedent and from plaintiff, and retention of the benefit is inequitable, absent reasonable compensation. *In re Estate of Lewis*, 168 Mich App at 74.

Plaintiff provided no evidence that decedent's retention of the benefit provided by plaintiff would be inequitable, absent compensation for plaintiff. Plaintiff and decedent lived together, and had a child together. The only evidence provided to show that plaintiff expected to be compensated for his efforts in assisting decedent was his own affidavit. In fact, it could be just as likely that plaintiff was acting out of the love and care for the mother of his child, and therefore, his care for decedent would not be considered inequitable. Thus, because the only evidence supporting plaintiff's position was his own affidavit, and no other evidence was provided to support plaintiff's ultimate contention, i.e., that he expected to be paid for his services and decedent expected to pay plaintiff for the services rendered, the trial judge properly denied the motion for summary disposition in order to assess plaintiff's credibility at trial. See *Wurtz*, 298 Mich App at 90.

The same credibility issues apply had the trial judge found that there was a presumption of gratuity and plaintiff had to prove a contract implied in fact. The main evidence supporting plaintiff's motion for summary disposition was his own affidavit, stating that he expected to be paid for the services he rendered to decedent, and that decedent had initiated the underlying lawsuit against decedent's insurance provider in order to recover the money owed to plaintiff. Again, summary disposition is improper in cases where credibility is integral to the determination. *Id.*

Secondly, plaintiff contends that summary disposition should have been granted because defendant failed to set forth facts as required by MCR 2.116(G)(4). This subrule states:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. *If the adverse party*

does not so respond, judgment, if appropriate, shall be entered against him or her. [MCR 2.116(G)(4) (emphasis added).]

As stated above, because plaintiff's contention that he had an oral contract with decedent was only supported by his own affidavit, plaintiff's credibility was central to the case. "[S]ummary disposition is rarely appropriate in cases involving questions of credibility[.]" *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005). Even though defendant did not attach documentary evidence to her response to plaintiff's motion for summary disposition setting forth specific facts showing there was a genuine issue for trial, it would not have been appropriate to enter judgment in favor of plaintiff.

In the present case, there was a genuine issue of material fact regarding whether there was a contract implied in fact between plaintiff and decedent. Though the trial judge erred in holding that the presumption of gratuity did not apply, plaintiff's credibility was a central factor in determining the existence of an implied-in-fact contract, and therefore, summary disposition was properly denied.

II. APPLICATION OF MCR 5.101(C)(2) AND MCL 700.1303(h)

Plaintiff next contends that the trial judge improperly construed the claim in the context of the amount of estate assets that should be distributed to plaintiff, instead of for the validity of plaintiff's claim for compensation for attendant care services. We disagree.

A. STANDARD OF REVIEW

Court rules and statutes are subject to the same rules of construction. *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010). Questions of statutory interpretation are reviewed de novo by this Court. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009).

B. DISCUSSION

The trial court did not err its application of MCR 5.101(C)(2) and MCL 700.1303(h). "Any action filed by a claimant after notice that the claim has been disallowed" must be titled a "civil action," must be commenced by filing a complaint, and is governed by the rules applicable to all civil actions filed in the circuit courts. MCR 5.101(C)(2). The probate courts of this state have concurrent legal and equitable jurisdiction to "[h]ear and decide a claim by or against a fiduciary or trustee for the return of property." MCL 700.1303(h).

Plaintiff contends that the trial judge erroneously found for plaintiff in the limited amount of \$8,400, because the trial judge reduced the amount of plaintiff's claim to a percentage of its actual value. Plaintiff is correct that the issue before the court was the validity of plaintiff's claim to the settlement with decedent's insurance provider for attendant care services. Additionally, plaintiff is correct that the trial court, as a probate court, had jurisdiction to hear a claim against a trustee of an estate for the return of property. See MCL 700.1303(h).

However, plaintiff mistakenly asserts that the trial court did not correctly apply its jurisdiction in this case. In his opinion and order, the trial judge stated that “[t]he issue to be resolved is solely what percentage or amount, if any, of this claim should the Plaintiff receive from the Estate when it is time for distribution of the Estate assets.” The trial judge went on to find that plaintiff could not have been decedent’s primary care provider for the entire time period for which decedent was suing her insurance provider for benefits. Assuming plaintiff did provide services to decedent, in the trial judge’s ruling, the judge found that the most care plaintiff could have provided was approximately 20 percent of what he claimed. The trial court had not reduced the plaintiff’s claim to 20 percent of the amount alleged because of limitations on the estate’s assets, and in fact, the trial court had not yet determined whether plaintiff would be eligible to receive all \$8,400 of the claim once distribution of the estate assets was completed, and all other creditors to the estate were taken into account. Thus, from a reading of the trial judge’s opinion and order, it becomes clear that the trial judge was properly analyzing the lawsuit as one for the validity of plaintiff’s claim for attendant care services due to him from the settlement with decedent’s insurance provider.

III. CONCLUSIONS OF LAW

Plaintiff also contends that the trial court’s opinion was based upon an erroneous conclusion of law, because the trial court held that plaintiff had to prove the existence of a contract implied in fact. We disagree.

A. STANDARD OF REVIEW

Questions of law are subject to de novo review. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002).

B. DISCUSSION

As stated above, the trial court erred in finding that there was no presumption of gratuity between plaintiff and decedent. However, the trial court then correctly addressed the issue under a contract-implied-in-fact analysis.

A contract implied in law is not an actual contract, but a legal fiction imposed to do justice, even though it may be clear from the circumstances that no promise was ever made or even intended. *In re Estate of Lewis*, 168 Mich App at 74. A contract may be implied in law if there is receipt of a benefit by one person from another, and retention of the benefit is inequitable, absent reasonable compensation. *Id.* This legal fiction, however, is not applicable where the relationship between the individuals giving and receiving the benefit is such that there is a presumption that the services were rendered gratuitously. *Id.* Such a presumption arises when the plaintiff is related by blood or marriage to the decedent, and where the parties lived together as husband and wife despite never having married. *Id.*

Even when a presumption of gratuity arises, a plaintiff may still recover for services rendered under the theory of a contract implied in fact. *In re Estate of Morris*, 193 Mich App at 582. A contract implied in fact arises when services are performed by someone who intends to be compensated from another who expects at the time of performance to compensate for those services. *Id.*

The trial judge incorrectly found that no presumption of gratuity arose between plaintiff and decedent. Plaintiff and decedent had a child together and cohabited for an extended period of time. These facts are sufficient to find that plaintiff and decedent were living together as husband and wife, despite never having married, and therefore, a presumption of gratuity applies. *Featherston*, 226 Mich App at 591; *In re Estate of Lewis*, 168 Mich App at 74. Further, in the case at hand, plaintiff testified that he and decedent were engaged to be married, and presented decedent to others as his “fiancé.” This fact, when coupled with the others, only further supports a presumption of gratuity for the services plaintiff rendered on behalf of decedent. Therefore, because a presumption of gratuity applied to the services plaintiff rendered to decedent, the trial judge properly found that plaintiff was required to prove a contract implied in fact in order to recover on his claim for attendant care services. See *In re Estate of Lewis*, 168 Mich App at 74.

IV. FINDINGS OF FACT

Finally, plaintiff contends that the trial judge’s opinion was based upon erroneous findings of fact, because the trial judge found that plaintiff had not proven the beginning date for his attendant care services, inquired about decedent’s first lawsuit against her insurer, found plaintiff not credible, and found that plaintiff could only have provided 20 percent of the care decedent received. Again, we disagree.

A. STANDARD OF REVIEW

A trial court’s findings of fact are reviewed for clear error. *Mericka v Dep’t of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009). “A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made.” *Hannay v Dep’t of Transp*, 299 Mich App 261, 271; 829 NW2d 883 (2013).

B. DISCUSSION

The trial court did not base its opinion upon clearly erroneous findings of fact. It is the duty of the finder of fact to determine the credibility of evidence presented. *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 103; 574 NW2d 36 (1997). This Court will respect the trial court’s superior position to make credibility determinations of witnesses, and will not revisit those determinations on appeal. *Shann v Shann*, 293 Mich App 302, 307; 809 NW2d 435 (2011).

Plaintiff’s claim was supported by the testimony of three individuals: plaintiff, plaintiff’s son, and the attorney that represented decedent in the lawsuit against her insurance provider. Defendant supported her defense with testimony that directly contradicted much of the testimony by plaintiff and plaintiff’s son, and even some of the assertions made by the attorney. The trial judge found that plaintiff had a number of credibility issues, and that defendant’s testimony was much more credible.

Plaintiff first argues that the trial court erred in finding that he did not establish the beginning date for his services. The trial court found that, despite its requests, neither plaintiff nor the attorney from the State Farm lawsuit provided any calendars or attendant care service schedules to show the dates and amounts of care plaintiff provided decedent. The finder of fact

may draw an adverse inference against a party that has failed to produce evidence only when the evidence was under the party's control and could have been produced, the party has no reasonable excuse for the failure to produce the evidence, and the evidence is material. *Ward v Consol Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005). Decedent's attorney from the lawsuit against her insurance provider testified that it was his standard custom and practice to have family providers fill out and maintain calendars documenting the hours of care they provide, and the attorney remembered providing such calendars to the insurer. The trial judge found, and we agree, that these schedules were in plaintiff's control and could have been produced, that plaintiff had no excuse for his failure to produce the schedules, and that these schedules were material to the case. The trial judge was allowed to make an inference against plaintiff because of his failure to produce these schedules, and it was such an inference that led to the judge's finding that the starting date for plaintiff's services rendered to decedent could not have begun when plaintiff claimed.

Plaintiff next argues that the trial court erred in requiring the live testimony of the attorney, and then inquiring about decedent's first lawsuit against the insurance provider, which was irrelevant to the instant case. Under MRE 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Further, a witness may be impeached by showing the improbabilities of his story through admission of previous conduct or statements that are inconsistent with the testimony. *Gilchrist v Gilchrist*, 333 Mich 275, 280; 52 NW2d 531 (1952).

Because decedent had previously settled with the insurance provider for a similar claim for attendant care services, and because the attorney testified that plaintiff had rendered attendant care services in the first suit, it was relevant to the determination of what decedent was planning to do with the settlement in the instant case to consider her previous conduct with settlement monies. See *id.* Therefore, the trial court did not err in questioning the attorney about decedent's use of the first settlement with her insurance provider.

Third, plaintiff argues that the trial judge erred in finding that the sole issue to be resolved was what percentage or amount, if any, of plaintiff's claim should be distributed from the estate's assets, and if this was a finding of fact, it was clearly erroneous. This was a conclusion regarding the trial court's jurisdiction, and therefore, is a question of law. See *Nash v Salter*, 280 Mich App 104, 108; 760 NW2d 612 (2008). Further, as stated above, the trial court did not err in determining the issue before it.

Fourth, plaintiff argues that the trial court erred in finding plaintiff not credible because of his previous experience with the legal system and his failure to intervene in decedent's lawsuit against her insurance provider. Again, an appellate court will not disturb a fact finder's credibility determinations on appeal. *Shann*, 293 Mich App at 307. Therefore, the trial judge did not clearly err in finding that plaintiff was less credible than defendant because of either plaintiff's legal experience or his failure to intervene in the lawsuit against decedent's insurance provider.

Finally, plaintiff claims that the trial court erred in finding that only 20 percent of the services that plaintiff claims to have rendered to decedent could actually have been provided. At

trial, plaintiff and plaintiff's son both testified that they each did the majority of the housework. Further, defendant testified that decedent was capable of at least doing minor chores around the house, and of cooking dinner when defendant came over to visit. On the basis of this testimony, and in light of the trial court's credibility findings, it was not clear error for the trial court to find that plaintiff's claim regarding money owed for services rendered was inflated.

V. CONCLUSION

The trial court did not err in denying plaintiff's motion for summary disposition because there was a genuine issue of material fact as to the existence of a contract implied in fact, and defendant's failure to attach affidavits or other factual support to her response did not necessitate summary disposition in plaintiff's favor. Second, the trial court properly analyzed the lawsuit as a claim against an estate or trustee for the return of property, and therefore, did not err in the application of its jurisdiction to the instant case. Third, the trial court erred in finding that no presumption of gratuity applied, but then properly found that plaintiff had the burden of showing that there was a contract implied in fact, so the error of law does not merit reversal. Finally, the trial court did not make any clearly erroneous findings of fact by using evidence of decedent's conduct involving her first settlement with her insurance provider or by finding plaintiff less credible than defendant.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Michael J. Riordan